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IN THE

Supreme Court of the United States

October Term, 1966

No. 651

SIMON L. HOWARD,

Petitioner,

v.

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY,
a Corporation,

and

BROTHERHOOD OF RAILWAY TRAINMEN,
an Unincorporated Association.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on June 17, 1966, in the above-entitled cause.

Opinion Below

The opinion of the United States Court of Appeals is reported at 361 F. 2d 905 and is appended hereto, *infra*, at page 1a. The final opinion of the United States District Court for the Eastern District of Missouri, is reported at 244 F. Supp. 1008 and is appended hereto, *infra*, at page 15a. The first memorandum opinion of the District Court is unreported and is appended hereto, *infra*, at page 23a.

Jurisdiction

An opinion affirming the judgment of the United States District Court which dismissed petitioner's complaint was filed by the United States Court of Appeals on June 17,

1966. The Mandate of the United States Court of Appeals was issued on July 12, 1966. On August 8, 1966 the United States Court of Appeals denied petitioner's application for an order recalling the mandate and for a stay of execution of an order for taxation of costs. Jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254 (1).

Questions Presented

1. Are the statutory and constitutional rights of petitioner and the class he represents violated by incorporation into the Railway Labor Act as a craft, a racial classification which operates as a bar to the exercise of the rights accorded and protected by that Act and by the Constitution.

2. Where a claim that racial discrimination is being effectuated and accomplished under the aegis of the Railway Labor Act states a justiciable cause of action, is refusal of federal jurisdiction and dismissal of petitioner's class complaint error, and a violation of the rights of petitioner and the class to due process of law mandated by the Constitution.

Constitutional and Statutory Provisions Involved

1. This case involves the due process clause of the Fifth Amendment of the United States Constitution.

2. This case also involves the Railway Labor Act, Title 45, United States Code, Sections 151, *et. seq.* The text of provisions pertinent to this case are appended hereto, *infra,* at pages 36a-47a.

3. This case also involves Title 42, United States Code, Sections 2000e-2(a)(1) and (2) and subsection (c)(1)(2) and (3).

Statement

1, The Complaint

This action was disposed of upon motions for dismissal of the complaint and for summary judgment prior to a trial on the merits but subsequent to partial discovery. For this reason, and in view of the decisions of the courts below, an analysis of the complaint follows:

Jurisdiction rests upon the Railway Labor Act and the existence of a federal question; the case arises under an Act of Congress regulating commerce; additionally a declaratory judgment and definition of the rights and obligations of the parties is sought. Petitioner, and the class he represents are Negroes employed by respondent St. Louis-San Francisco Railway to perform brakemen duties on trains. The designation "train porter", is defineable only in terms of race and is therefore arbitrary and racially discriminatory. It imposes, and is utilized by respondents to cause economic detriment to petitioner's class. Although Negro train porters and white brakemen perform the same duties, Negroes receive less remuneration, are refused job assignments, have no provisions for promotion and are restricted to passenger trains. Respondent Brotherhood of Railroad Trainmen, a union, is pursuant to the Railway Labor Act, the recognized collective bargaining agent for brakemen employed by respondent Railway. In March, 1946, after continued demonstrations of hostility to petitioner's class, respondents concluded a contract which required the discharge of Negro train porters and their replacement by white brakemen. Successful litigation in the federal courts resulted in the voiding of the contract and the restoration of members of petitioner's class to their positions.

After rendition of this Court's opinion in *Brotherhood of Railway Trainmen* v. *Howard*, 343 U. S. 768 (1951), petitioner's class sought from the National Mediation Board relief from their racial classification, recognition of the

functional character of their services and rights equal to others performing similar services. The National Mediation Board declined to entertain a question of classification, absent a dispute between two unions claiming the same craft or class (R. 95).

This procedure having provided no remedy, the racial classification and its restrictive ramifications were sought to be eliminated and the services of the Mediation Board were again invoked by notice to respondent Railway for a change in working conditions and rates of pay, provided by contract, pursuant to Section 2, Sixth of the Railway Labor Act (R. 96-97). Because this procedure requires both parties to agree to arbitration, the refusal of respondent Railway to participate resulted in the denial of any relief. The Railway asserts that the Railway Labor Act precludes it from participating in this procedure. It contends that because of the existence of an agreement between it and the BRT, the Railway Labor Act precludes the Railway from entering into an agreement, governing rates of pay and working conditions of "brakemen", with any labor organizations other than the BRT, and further that arbitration would result in breach of its contract with the BRT (R. 99-100).

In a further effort to secure the protection and representational rights provided by the Railway Labor Act, petitioner and members of his class have applied to the BRT for membership. Membership has been refused upon the union's assertion that the classification "train porter" bars their admission (S.R. 215).

The power and authority conferred by the Railway Labor Act and the entire collective bargaining process is being used by respondent BRT to create and perpetuate a white racial class from which Negroes are discriminatorily excluded and thereby deprived of their federal rights. Respondent Railway is aware of these facts and acts together with the union, to continue this circumstance. The Railway Labor Act, by compelling observance of the BRT

contract which, itself, is the product of the racial discrimination inherent in the employment of petitioner's class as train porters, fosters and maintains that discrimination.

Specific acts of discrimination complained of were inclusion in the 1950 BRT contract of a provision transferring troop trains from freight to passenger service and the custom and practice of respondent Railway, with the tacit agreement and participation of the BRT, of terminating train porter jobs which are then performed by brakemen.

Relief requested included damages, an injunction against perpetuation of racial classes and crafts accomplished by virtue of authority conferred by the Railway Labor Act, an injunction against the BRT's denial of membership to applicants from the class represented by petitioner and against all practices and procedures sanctioned by the Act whereby petitioner and the class he represents are deprived of seniority and employment rights and job assignments to which they would be entitled except for their race and resultant segregation as train porters.

2. Prior Proceedings

Litigation of this case began on October 16, 1962, on behalf of an all-Negro group of railway employees denominated as train porters for an injunction against racially discriminatory practices of respondents, for a declaratory judgment of their rights and for damages. Respondents are the St. Louis-San Francisco Railway, a corporation of the State of Missouri, petitioner's employer, hereinafter referred to as the Railway, and the Brotherhood of Railway Trainmen, hereinafter referred to as the BRT. The BRT represents, among others, brakemen and conductors employed by respondent Railway. Jurisdiction was invoked pursuant to 45 U. S. C. A. Sections 151 *et seq.* (the Railway Labor Act), 28 U. S. C. A. Sections 1331, 1337, 2201 and

2202. The original complaint was amended on November 29, to correct a typographical error and on December 17, 1962, to delineate in greater detail the gravamen of the complaint (R. 11-19).[1] Petitioner complained of racially discriminatory practices accomplished under the aegis of the Railway Labor Act through cooperation between and the concerted actions of respondents, and that the Act itself provides and is used by respondents as a shield against all means of relief from racial discrimination. Specific acts complained of have occurred since the conclusion of the related case of *Brotherhood of Railway Trainmen* v. *Howard*, 72 F. Supp. 695 (D. C. Mo. 1947), rev'd 191 F. 2d 442 (8th Cir. 1951), aff'd 343 U. S. 768 (1951); 215 F. 2d 690 (8th Cir. 1954).

Respondents filed motions for dismissal and for summary judgment addressed to both the complaint and the amended complaint (R. 8, 25, 35, 36). Additionally, both interrogatories and requests for admissions were served upon and responded to by petitioner (R. 9, 10, 19, 20, 21-24, 30, 33). On February 16, 1963, subsequent to the filing of briefs by all parties, oral argument was heard by the United States District Court for the Eastern District of Missouri which then took the matter under advisement. On December 30, 1963 the trial court filed a memorandum opinion and order denying the motions for dismissal and summary judgment (R. 39), but found it lacked jurisdiction over all allegations save those set forth in two paragraphs of the amended complaint which described specific discriminatory acts (R. 39-47)(a).

Interrogatories were filed by the respondent Railway in January, 1964 and answers were filed by petitioner on

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[1] The printed record filed with this Court is in two sections. Volume I designated "Record" will be referred to as (R.); Volume II designated "Supplemental Record" will be referred to as (S.R.).

February 14th. Through a series of court orders, respondents' time to answer was extended to March 9, 1964 (R. 212-213). On May 18, 1964 the district court scheduled the case for trial on August 17th. On July 10th, respondent Railway filed interrogatories preliminary to taking the depositions of all members of the petitioner's class at their various residences, which included Mississippi, Tennessee, Missouri, Alabama and Kansas. Petitioner filed objections and subsequent to a conference of counsel called by the trial judge on August 4, 1964, it was agreed to take these depositions in two locations; thereafter petitioner would depose respondents' officers and agents. The trial date was adjourned to December 28, 1964. Commencing in November, 1964, depositions were taken by respondents in Springfield, Missouri and in Memphis, Tennessee. On December 10, 1964 petitioner served and filed requests for admission of facts and genuineness of documents. Respondents replied on December 18 with motions to strike the request for admissions and for summary judgment (R. 102, 105, 108, 110). As a result, the December 28th trial date was vacated.

In January, 1965 petitioner moved to strike respondents' motions for summary judgment, pursuant to Rule 56(f) F.R.C.P. (R. 114-118). One week thereafter respondents filed responses to the requests for admissions which objected to substantially all matters therein as irrelevant. While these motions were pending and after adjournment of the December, 1964 trial date, petitioner deposed several of respondents' agents and employees in further aid of discovery. Completion of the petitioner's discovery procedure was interrupted on March 16, 1965 when the respondent Railway filed with the Interstate Commerce Commission and posted at its terminals a notice of discontinuance of all passenger trains pursuant to Title 49, United States Code, Section 13(a)1 (R. 170-171). Section 13(a)1 is a

self-operating statute authorizing discontinuance unless the Interstate Commerce Commission elects to have a hearing.[2]

This case appeared on the June, 1965 district court calendar. Petitioner's counsel, in answer to a request for a trial date, was advised that a trial would not be scheduled due to the pendency of the aforesaid motions. Because discontinuance of any or all passenger trains threatened to render this action moot, on August 4, 1965 petitioner filed a motion for a temporary restraining order, for preliminary injunctive relief and for amendment of the trial court's opinion of December 30, 1963 based upon a change in controlling law since the filing of that opinion. The motion was filed with a supporting brief and a request for oral argument. The trial court denied a temporary restraining order and declined to set a date for oral argument. On August 10, 1965 the trial court filed its final memorandum opinion and judgment wherein it sustained respondents' motions for summary judgment, dismissed petitioner's complaint and awarded costs to respondents. After awarding summary judgment, the trial court concluded its opinion:

> All other motions have been mooted by our disposition of the motions for summary judgment.

Accordingly, petitioner's motions for preliminary injunction and for amendment of the interim order of the trial court were not considered by the district court.

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[2] Sec. 13(a)(1) of the Interstate Commerce Act requires a railroad to post notice of discontinuance of service at all terminals and further provides that if the I.C.C. does not elect to have a hearing, trains may be discontinued 30 days after the notice is posted. In this instance the I.C.C. elected to investigate the proposed discontinuance of trains not in excess of 4 months beyond the period in which discontinuance would have become effective. Hearings occurred in St. Louis and Springfield, Missouri, Kansas City, Kansas, Oklahoma City, Oklahoma, Arkansas, Birmingham, Alabama and Memphis, Tennessee, May 19, 1965 through May 20, 1965 and the hearing officer required that briefs be filed by June 28, 1965.

On September, 1965 the Interstate Commerce Commission filed an opinion authorizing the discontinuance of all but two of respondent Railway's passenger trains. The opinion provided further that the Railway might petition after a year, for discontinuance of the remaining passenger trains.

As a result of the discontinuance, members of petitioner's class whose jobs were terminated filed complaints with the Equal Employment Opportunity Commission under Title 42, Sections 2000-c *et seq.* The Commission made a finding of discriminatory practices against both the BRT and the Railway. Conciliation has not been effected.

Timely appeal was taken to the United States Court of Appeals for the Eighth Circuit and petitioner simultaneously moved for entry of an injunction pending appeal; this motion was denied by the court below. The appeal was argued on March 3, 1966 and on June 17, 1966 the court below filed its opinion affirming the judgment of the district court. It is from this opinion that review by this Court is sought.

3. Statement of Facts

Petitioner, Simon L. Howard, a Negro citizen of the State of Tennessee is employed by respondent Railway in operational service (R. 11) and is denominated by the Railway as a train porter as are all Negroes in operational service. He brings this action on behalf of all other similarly situated employees of respondent Railway. Train porters are an all-Negro group of employees who perform brakemen duties on the head end of respondent Railway's passenger trains (R. 54, 152, 165). Petitioner originally applied for and was hired in freight service as a brakeman in 1914. In 1917, after injuries received in the course of his employment, petitioner requested transfer to passenger service as a train porter because he was losing working

days while recovering his health [3] (R. 24). The experience of being originally employed as a brakeman is unique to petitioner, all other members of the class he represents initially having been hired as train porters. Respondent Railway has pursued racially discriminatory hiring practices which result in all Negro applicants for operational service being designated as "train porters." White persons who applied for substantially similar positions were hired as "brakemen" (R. 39, 188) (S.R. 39, 53). There are not now, nor have there ever been any white train porters (R. 134).

Both Negro train porters and white brakemen are required to pass the same physical examination and an examination regarding the operation of trains. They are similarly qualified, are both held responsible for errors omitted in the operation of the train and are similarly penalized for such errors (R. 138, 141, 142-43, 152, 159, 172). Train porters are restricted to passenger service whereas white brakemen acquire dual seniority in both freight and passenger service (R. 136, 139). Moreover, brakemen have the right to promotion to conductor, whereas Negro train porters remain train porters for the length of their employment.

It may be judicially noticed from *Brotherhood of Railway Trainmen* v. *Howard*, 343 U. S. 768 (1951) that originally train porters were employed to perform brakemen duties at the head end of passenger trains and to clean cars and assist passengers, but that by 1946 and up to the present time 95% of their duties are those of brakemen, while 5% consists of the sweeping of aisles and assistance of

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[3] In the late 1800's and early 1900's Negroes were employed in both freight and passenger service by many of the railroads. Resentment toward Negroes by white employees as well as attempts to displace them from their jobs began as early as 1890 (Locomotive Firemen's Magazine, Nov. 1898, vol. 30, pp. 526-528) and has continued throughout the years. The removal of Negroes from the industry has been aided by refusal of the four main operating unions to admit Negroes to membership.

passengers (R. 137, 139-40, 143, 150, 155, 159). Although train porters have received less wages for the same duties performed by brakemen, during the First World War when the government assumed control of the railroads, all persons performing brakemen duties were so classified and wages were equalized. Upon the return of the railroads to respondent Railway, the Negro brakemen were redesignated "train porters" and their wages were reduced below those of white men although their duties remained the same (R. 38). In 1928 respondents participated in an agreement whereby the Railway agreed not to hire Negroes in train, engine and yard service "not including train porters." Since that date respondent Railway has refused to hire Negroes as brakemen (R. 144, 155-59, 159-60, 172).

In November, 1963 respondent Railway posted on its bulletin boards a notice to labor unions and other organizations of workers entitled "Non-Discrimination in Employment" stating the obligation of the Railway not to discriminate against any employee because of race including, but not limited to transfer, hiring, upgrading, rates of pay, etc. pursuant to Executive Order 10925 (R. 174-175). Consistent with its former discriminatory policy (R. 153), respondent Railway continued to exclude Negroes from employment as brakemen. Members of petitioner's class have bid for available jobs as brakemen since November, 1963, but have received no response from the Railway (R. 161-62).

The seniority of petitioner's class extends from 1914 to 1956; seniority of the majority of the members of the class ranges between 1914 and 1950. Prior to 1946 train porters had no representational unit for the purpose of collective bargaining (R. 37). Negroes were openly barred from membership by the Constitution of the BRT until 1960 when the word "white" was deleted from that document (R. 202). Members of petitioner's class having been unable to obtain representation by the BRT, associated with a Negro labor organization in 1944. They are represented by

the Association of Railway Trainmen and Locomotive Firemen, an organization which represents a variety of Negro railroad employees who are unable to gain access to white unions (R. 38).

In an uncontested election in which the BRT was not placed on the ballot, the aforesaid Association was certified by the National Mediation Board as collective bargaining agent for Negro trainmen employed by respondent Railway (R. 38) (S.R. 10, 39, 41, 217-218). Although the BRT has Negro members in lodges of other railroad industries, there are clear indications that no Negroes are members in any of the locals or lodges representing employees of respondent Railway (S.R. 206, 208-209). Members of petitioner's class who have applied for membership in respondent BRT have been refused membership without explanation or upon the assertion that their designation as train porters precludes their membership in that union (R. 161) (S.R. 142-143). Membership is accepted or rejected at the level of the local lodge (S.R. 203).

Respondent BRT is the recognized bargaining agent for brakemen employed by the respondent Railway and the record includes a copy of the contract between respondents.[4] This contract secures to brakemen job assignments, basic wages based upon daily rates, dual seniority in passenger and freight service and rights of promotability to conductor. Through the organization designated as official bargaining agent for train porters, there was executed in October 1955, an agreement which restricts train porters to passenger services, does not describe their duties, but places them under the supervision of the conductor or supervisor of the Railway and further provides that train porters shall work only on those trains designated by the employer (R. 144-47, 173-74). The contract was arrived

[4] Authorization was received from the United States Court of Appeals for the Eighth Circuit to submit copies of the contracts involved in this action rather than to print them. Accordingly, these exhibits are filed with and are part of the record in this proceeding.

at on a "take-it-or-leave-it" basis (R. 149) since respondent Railway refused to discuss or negotiate the question of train porters working in both passenger-freight service, refused to designate their duties and provided for payment on a mileage basis rather than on the daily basis accorded white brakemen (R. 144-49).

In 1960 and at varying times thereafter, respondent Railway commenced a practice whereby the assigned runs of train porters were attenuated; at certain points, they were relieved of their job assignments and their duties were subsequently performed by brakemen and conductors (R. 69-70, 130, 133, 135, 145, 156-57, 162-64) without any recognition of any distinction between "brakemen" and "train porters" (R. 68, 129, 133). Brakemen and conductors also assisted passengers and handled luggage (R. 135-136, 140).

Attenuation of runs resulted in shorter mileage and therefore reduced wages. The duties performed by the train porters had not become unnecessary but were taken over by the brakemen after termination of the train porter's run. Whereas any suggestion of the crossing of areas of job function by train porters is resisted, the assumption of train porter duties by brakemen proceeds as a regular occurrence. There are repeated instances of the use, by respondent Railway, of brakemen to work train porter assignments when the regular man is absent, but there are available train porters on the extra board (R. 80, 155) (S.R. 63).

Additionally, prior to 1946 troop trains which carried servicemen were a part of respondent Railway's passenger service. After commencement of the prior litigation, the Railway, pursuant to a decision of management transferred troop trains to freight service where train porters may not work (R.127, 155). The last contract between respondents contains a provision, that effective September, 1950, passenger crews were to be replaced with freight crews on troop trains, thereby terminating the services of peti-

tioner and his class on those trains and replacing them with white brakemen (R. 127). Conversion of a troop train in passenger service to one in freight service is accomplished by placing a caboose on the end of the train.

In these circumstances where the runs and consequent mileage of train porters have been attenuated, both conductors and brakemen continue to work on the trains and assume the job assignments of train porters including the assistance of passengers, the carrying of luggage and the operational duties (R. 135-36, 140, 156-58, 161) (S.R. 45).

Reasons for Allowance of the Writ

1. The decision of the court below affirms a summary judgment and finds nonjusticiable a complaint, which charges racial discrimination practiced under the aegis of federal legislation as well as the perpetuation and protection of an unlawful racial classification by federal legislation. Thus, the decision below is in conflict with principles established in *Steele* v. *L. & N. R. Co.*, 323 U. S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U. S. 210 (1944); and the many cases which followed them. *Steele* determined that because the Railway Labor Act restricts the individual's rights to contract and empowers a bargaining agent to act for and bind a unit of employees, that federal power may not be used to discriminate against other employees on the ground of race. The prohibition against hostile discrimination within a bargaining unit was extended, in *Brotherhood of Railroad Trainmen* v. *Howard, supra,* to preclude all invidious discrimination.

While these decisions are broad delineations of the restrictions and obligations imposed by the Railway Labor Act, the decisions of the courts below are premised upon a restrictive view of invidious discrimination under the Act. Both the district and appellate courts conceive of proscribed racial discrimination only in the specific terms evidenced in *Steele, Tunstall* and *Howard, i.e.,* exaction of a contract

which removes Negroes and replaces them with whites. It is clear from its language that *Steele* v. *L. & N. R. Co., supra,* is more than an admonition that certified bargaining agents must refrain from negotiating discriminatory contracts. The interdiction against such conduct is constitutional in nature and issues from the enabling federal legislation. The right invaded by discrimination is federal in origin and the legal consequences of racial discrimination, in any form and whether subtle or overt, are matters for judicial determination. Whether federal legislation enters into the making of a racially discriminatory contract, whether it provides sanctions for observance of such a contract or produces or protects discriminatory acts, the violation is the same and no administrative remedy is either adequate or available. *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F. 2d 493 (4th Cir. 1951); *Central of Georgia Railway Co.* v. *Jones*, 229 F. 2d 648 (5th Cir. 1956).

The error of the court below finds its genesis in the first memorandum opinion of the trial court (23a) which concevied of the issue of classification as separate and apart from racial discrimination. The determination that petitioner sought reclassification, an issue without the jurisdiction of the court, and that only the two paragraphs (14 and 15) describing specific discriminatory acts presented a valid claim for relief, restricted subsequent proceedings.

It is well settled that racial discrimination accomplished under or through the Railway Labor Act is remedial in the federal courts and that resort to administrative agencies is not required. *Conley* v. *Gibson*, 355 U. S. 41 (1957); *Central of Georgia Railway Company* v. *Jones, supra.* Because the federal statute places the imprimatur of federal law upon contracts negotiated under it, invasion of the concomitant federal right is prohibited; the federal policy is to preserve those rights. *Railway Emp. Dept.* v. *Hanson*, 351 U. S. 225 at page 232 (1956); *Steele* v. *L. & N.R. Co., supra.*

This case raises questions more complex than whether racial discrimination is intended by abolition of train porter positions by an employer railway which then assigns the duties of the displaced personnel to brakemen; and whether such activity is insulated from review because there is no designation of duties in the contract between petitioner and respondent Railway. All of the factors which have resulted in petitioner's inferior and circumscribed position emanate from racial discrimination. Petitioner contends that the racial discrimination which violates his federal rights and impairs his economic survival, is facilitated by the provisions of the Railway Labor Act which memorializes "crafts" and "classes". The preservation and protection of crafts and classes granted by the Railway Labor Act (Sections 2, Eleventh (c) and Section 1), upon its adoption gave statutory recognition to a racial caste system.

The gravamen of the complaint then is the constitutional validity of the incorporation of a racial classification into a federal act. This was asserted repeatedly in terms of perpetuation of a racial craft under authority conferred by the Act, and the fostering and maintainance of racial discrimination by virtue of the Act's provisions.

Racial classifications warrant severe scrutiny and are constitutionally suspect. *Korematsu* v. *United States,* 323 U. S. 214, 216 (1944). The proscription against discrimination by a statutory bargaining agent enunciated in *Steele,* evolves from the mandates of the constitution.

A classification, postured upon race and discriminatory in effect may not be elevated to the level of a "craft" protected by federal legislation, consistent with the guarantees of the Fifth Amendment. Since Congress may not legislate rights which are restricted on the basis of race, beneficiaries of federal legislation are required to function within the confines of the constitutionally permissible. *Schneider* v. *Rusk,* 377 U. S. 163 (1964),

Employment of Negroes to perform braking duties and their designation by the Railway as train porters to dis-

tinguish them from white brakemen is an arbitrary act definable only in terms of race. Classification as a labor term is not the real issue in this case; classification is merely the indicia of proscribed practices. Resolution of the constitutional questions presented here on the basis of jurisdiction over disputed questions of class or craft is an oversimplication. The inferior status of petitioner and the class he represents, is the result of fragmentation of the issue of racial discrimination into neatly isolated concepts of labor law, none of which are relevant to the complaints of the train porters and all of which have or are claimed to have statutory protection. Negotiation of a contract recognizing the true nature of petitioners' duties, providing for job descriptions and assignments consistent with actual performance, and for promotion and equal remuneration for the same work performed by white brakemen is denied by respondent Railway upon the ground that such a contract would be tantamount to that accorded white brakemen and is thereby prohibited by the Railway's duty to "treat" only with the certified agent of the brakemen (Section 2, Ninth).

Exclusion of Negro petitioners from respondent BRT is claimed to be based upon their membership in another craft, that of train porter. These assertions have *apparent* validity by reason of the very Act which initially burdens Negro plaintiffs with a craft designation and then denies relief because of that craft designation. Moreover, the Act created the organizational bargaining representative of white brakemen, imbued it with protected privileges which individual member employees lack and became the instrumentality and creator of a powerful unit, able by virtue of its strength, to use the threat of a strike to acquire agreements which impinge on the rights of minority Negro employees.

A prior finding of nonjusticiability imposes no bar to jurisdiction where, upon examination, it appears that constitutional issues are substantial and protected rights are im-

paired. *Baker* v. *Carr*, 364 U. S. 898 (1962). Moreover, the development of decisional authority since *Bolling* v. *Sharpe*, 347 U. S. 497 (1954) and the enactment of the Equal Employment Opportunity section of the Civil Rights Act of 1964 represent sufficient changes in controlling law to eliminate any bar of *res judicata*. The determination of the court below that it lacked jurisdiction to accord a remedy because of the existence of "disputed questions of class" obscures the central issue of racial discrimination which merits relief from this Court.

2. There is no adequate administrative remedy which will afford relief to petitioner and the class he represents. The suggestion of the court below that recourse to the Mediation Board will be fruitful is ill-founded. The importance of review by this Court is further demonstrated by the appellate court's observations relating to petitioner's initial appeal for relief to the Mediation Board. The decision of the court below is that petitioner had not properly invoked the services of the Mediation Board because proceedings were not formally invoked under Section 2, Ninth of the Railway Labor Act (9a) lends support to petitioner's contention that the Act itself is a contributing factor to the immutability of the status quo. When the Act serves to insulate discriminatory acts from attack, whether by reason of judicial interpretation or Congressional intent, a less restrictive construction is mandated by the Constitution if due process requirements are met. This Court was cognizant of that fact in *Steele* v. *L. & N.R. Company, supra*, when after examining the nature of the complaint, it found that a hearing before either administrative tribunal would not constitute an adequate administrative remedy.

The Mediation Board stated its position clearly:

> The Board, on many occasions, has stated in various findings and determinations that it has no power under the Railway Labor Act to create a craft or class for representation purposes. * * * It will therefore be seen that the Board is not in posi-

> tion to make a ruling on the question of a proper classification of porter-brakemen employed by the St. Louis-San Francisco Railway in the absence of appropriate application for its services under Section 2, Ninth, of the Railway Labor Act. (R. 95)

and the Record establishes that further resort to the Board would be a futile gesture. In 1954, petitioner's class did in fact, invoke this section; the result was certification of their present statutory agent. The policy of the Mediation Board precluded the BRT from appearing on the ballot since it did not invoke the services of the Board (S.R. 217). The precise procedure suggested by the court below was followed; an investigation was held, a dispute perceived and an election ensued. The only organization on the ballot was the Negro Association to which petitioner and the class he represents resorted for some type of representation. The relative merits of being represented by a large and powerful union as opposed to one whose forcefulness is impaired by size and race, is easily evaluated.

The requirement of resort to the Mediation Board in this case imposes but one more obstacle to achievement of some semblance of equality of treatment for petitioner. Moreover, it refutes the maxim that equity will not require the doing of a vain and useless act. Recently in *Brotherhood of Railway & Steamship Clerks* v. *Association,* 380 U. S. 650 (1965), this Court sustained the form of ballot used by the Mediation Board in elections and approved its interpretation of its statutory duties. As in *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943) and *General Committee* v. *M-K-T-R. Co.,* 320 U. S. 323 (1943), the classification question arose within the framework of a jurisdictional dispute. Although it was contended that the Board had ignored an express command of the Act, this Court held that the Board's action was reviewable only on the issue of whether it had performed its duty to investigate.

Similarly, in *Steele,* there is the implicit acknowledgment that elections occur within one unit.

> While the majority of the craft chooses the bargaining agent. . . .

and that classification questions can only be raised within the framework of a jurisdictional dispute, a factor absent from this case because of its nature. Under these circumstances, the Mediation Board affords no adequate administrative remedy to petitioner.

(a) Resort to the Railroad Adjustment Board is equally as futile a gesture as relegation of petitioner's claims to the Mediation Board. It is conceded that the Railway Adjustment Board has jurisdiction over minor disputes, *i.e.,* questions or grievances requiring the interpretation of existing contracts. It is undisputed that Section 23 of the contract between the Association of Railway Trainmen and Locomotive Firemen, statutory representative of the train porters and the Railway, provides that train porters shall work only on such trains as are determined by the Railway. Petitioners claim that adequate wages, job assignments and the normal protection afforded by the union contracts is absent from theirs. Accordingly, their complaint cannot be remedied by the Railway Adjustment Board.

The position in which petitioner and his class find themselves is the result of the racial discrimination inherent in their employment. Petitioners do not argue that the inequities which they have endured should be remedied merely because they are inequities. Those inequities are the unavoidable and foreseeable consequences of racial discrimination inflicted upon them initially when they were designated train porters and compounded by the provisions of the Railway Labor Act which sanctions the collective bargaining agreement of respondent BRT. The BRT has been able to expand its area of operation and, to secure to its members favorable promotional rights, seniority rights and the like, at the expense of petitioner and his class. The record reflects the long history of overt hostility on the part of the

BRT toward train porters. The defenses raised by respondent BRT, allegedly to protect its contractual rights in accordance with the Railway Labor Act, do not deal with the fact that the preferred status of white brakemen was achieved by reason of unlawful restrictions upon petitioner and his class, based solely upon the fact of their race. As in *Steele, supra,* the issue for determination in this case is not who is entitled to represent a craft or whether an interpretation of a contract will clarify the rights of the parties. Where both classification and contracts provisions are directly traceable to and the product of manifest racial discrimination, denial of relief in a federal court invades petitioners' due process rights. *Syres* v. *Oil Workers International Union,* 223 F. 2d 738 (5th Cir., 1955), rev'd 350 U. S. 892 (1955), rehearing denied, 350 U. S. 943 (1956).

(b) Section 2, Ninth of the Railway Labor Act, requires both the Railway and the representative of employees to make an honest effort to accommodate the demands of the other concerning wages, rules or working conditions. They must "bargain collectively" in accordance with the philosophy of bargaining evolved in the American labor movement. Order of *Railroad Telegraphers* v. *Railway Express Agency,* 321 U. S. 342, 346 (1944).

Respondent Railroad has maintained its intransigent "take-it-or-leave-it" attitude which together with its other actions amounts to a refusal to "treat with" and bargain collectively with petitioner's representative in violation of Section 2 of the Railway Labor Act (R. 172-174). *General Electric Co. and International Union of Electrical, Radio and Machine Workers,* 150 N.L.R.B. No. 36 (1964); *N.L.R.B.* v. *Insurance Agents' International Union,* 361 U. S. 477, 487 (1960). That violation, is a direct cause of the situation which petitioner is seeking to remedy. When confronted with the Railway's refusal to bargain, petitioner's class did not strike. Instead, because of the extreme weakness of their bargaining position, they took the

"best they could get" from the Railway and signed an "agreement" in 1955. They did not thereby waive any claim. *National Licorice Co.* v. *National Labor Relations Board*, 309 U. S. 350, 361 (1940); *Henry I. Siegel Co.* v. *N.L.R.B.*, 340 F. 2d 309, 310 (2d Cir. 1965). In *Henry I. Siegel Co.* v. *N.L.R.B.*, the Second Circuit Court of Appeals held:

> the party unable to force the other to bargain . . . does not "waive" a completed refusal to bargain simply by signing up for the best it can get. 340 F. 2d 309, 310.

The foregoing principles invalidate the contract as a basis for a determination of petitioner's rights.

3. This case is of great public importance meriting review and determination by this court. *Bolling* v. *Sharpe*, *supra* and *Brown* v. *Board of Education*, 347 U. S. 483 (1954) began an era of broad recognition of rights to due process of law. Mandates imposed by the Fourteenth and Fifth Amendments extend into many aspects of American life. This less restrictive view of federal and federally protected rights compels resolution of the long existing grievances set forth in the complaint.

This thesis is fortified by the enactment into law of a federal fair employment act which creates new remediable rights and reflects congressional policy. Findings of racially discriminatory practices have been made by the E. E. O. C. against both respondents (48a), but to require petitioner and the class he represents to pursue yet another remedy, in the light of current law is the inflict a penalty rather than to accord relief. Moreover, the Equal Employment Opportunities Commission is a conciliatory body without powers of enforcement. The constitutional issues implicit in this case are ripe for full exposition. A review of related cases establishes the need for clarification of controlling law. The variety of opinions relating to essentially similar situations provides confusion rather than enlightenment.

Petitioner and the class he represents are in constant jeopardy of complete unemployment, should the two remaining passenger trains be discontinued. Although the economic and employment problems of the Negro are severe, history proves that the railroads and the main operating unions, have contributed to virulent racism in the rail transportation industry.

After a century of racial segregation in their industry, both the carriers and unions must be required to acknowledge the law. There is a tendency, reflected in the opinions of the lower courts, to rationalize discriminatory practices in this industry as an economic necessity related to automation and to the decrease in passenger service. The effect of such decisions is to condone open and willful disregard of the law by the carriers because it is in the past and to leave Negro employees unredressed, with an explanation of the carrier's financial plight.

Both respondents have disadvantaged train porters for years. Litigation of similar claims has rested in the courts for unreasonably lengthy periods of time, lost in a maze of motions. See *Randolph* v. *Missouri-Kansas-Texas Railroad Co.*, 68 F. Supp. 1007 (W.D.Mo. 1946); 7 F. R. D. 54 (W.D. Mo. 1947); 100 F. Supp. 119 (W.D. Mo. 1951) aff'd sub nom *Wood* v. *Randolph*, 209 F. 2d 634 (8th Cir. 1954). Eight years to litigate a claim for relief from racial discrimination does not instill confidence in the courts.

The disadvantaged position of the train porter results from a pattern of discrimination which immobilized him. Now, some states and federal law require fair employment. Implementation of new laws has evoked complaints from those whose preferred status was acquired at the expense of the rights of the Negro. The issues raised in this case are of public importance and the right sought to be protected has existed for years.

CONCLUSION

For the reasons hereinabove stated, it is respectfully submitted that this petition be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,146

SIMON L. HOWARD,

Appellant,

against

ST. LOUIS-SAN FRANCISCO RAILWAY COMPANY, A CORPORATION,

and

BROTHERHOOD OF RAILWAY TRAINMEN, AN UNINCORPORATED ASSOCIATION,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MISSOURI.

[June 17, 1966.]

Before MATTHES, MEHAFFY and GIBSON, Circuit Judges.

MATTHES, Circuit Judge.

Simon L. Howard, a Negro, brought this class action on behalf of all individuals comprising the craft or class of train porters, (approximately 35, all Negroes), against

their employer, St. Louis-San Francisco Railway Company, and the Brotherhood of Railway Trainmen. The latter has been certified, pursuant to election, by the National Mediation Board as the statutory bargaining representative for the craft or class of brakemen, among others.

The complaint alleged a cause of action under the Railway Labor Act, 45 U.S.C.A. § 151 et seq.; jurisdiction pursuant to Title 28 U.S.C.A. §§ 1331, 1337; and seeks a declaratory judgment pursuant to Title 28 U.S.C.A. §§ 2201 and 2202.

Hereafter we shall refer to Howard and the class he represents, collectively, as appellant; St. Louis-San Francisco Railway Co. and the Brotherhood of Railway Trainmen, severally as Frisco and Brotherhood, and collectively as appellees; National Mediation Board as Mediation Board.

The sum and substance of appellant's amended complaint is that although he has traditionally performed the duties of a brakeman, appellees have refused to classify him as such and to readjust his status along functional and operational lines, and have refused to establish and preserve his job assignment and seniority "as brakeman"; that he has been relegated to the class of "train porter" solely because of his race; and that through conspiratorial action, appellees have discriminated against appellant to his damage. In addition, Paragraph 14 of the amended complaint alleged that in violation of the Railway Labor Act appellees had agreed to replace full passenger crews with freight crews on troop trains, and thereby terminate the services of Negro train porters. Paragraph 15 alleged other unlawful practices by appellees throughout the past 10 years. Appellant sought: (1) declaration of rights, (2) injunctive relief, and (3) damages.

Appellees filed motions for summary judgment. In its first memorandum opinion, unreported, the District Court

held it had no jurisdiction to reclassify the craft of train porters. Being of the opinion, however, that Paragraphs 14 and 15 of the amended complaint stated grounds upon which relief could be granted, the court denied the motions for summary judgment. Extensive discovery proceedings followed which included interrogatories, requests for admissions, the depositions of 38 train porters by appellees and of three Frisco and two Brotherhood officials by appellant. A stipulation of facts was also filed.

Appellees again filed motions for summary judgment. The District Court, after due consideration, failed to find hostile racial discrimination, granted the motions and entered judgment, dismissing the complaint. The court's supporting memorandum opinion is reported at 244 F. Supp. 1008.

The principal question for our determination is whether, on this record, the District Court had jurisdiction and power, to require by appropriate order, that all Negro employees of Frisco, now in the craft or class of train porter, be placed in the craft or class of brakemen. We hold that the District Court's conclusion on this issue was correct.

The case comes to us on a voluminous record. We also take judicial notice of extensive prior litigation between these same parties, initiated by appellant in the United States District Court for the Eastern District of Missouri in 1946, which progressed by appeal to this court, by certiorari to Supreme Court, by remand to District Court, and by appeal again to this court, see *Howard* v. *Thompson*, 72 F.Supp. 695 (1947); *Howard* v. *St. Louis-San Francisco Ry. Co.*, 191 F.2d 442, (8 Cir. 1951); *Railroad Trainmen* v. *Howard*, 343 U.S. 768, (1952); *Howard* v. *St. Louis-San Francisco Railway Co.*, 215 F.2d 690, (8 Cir. 1954). The foregoing opinions present the factual history of train porters and the essence of the duties performed by them.

Appendix A—Opinion of the United States Court of Appeals

The craft or class of train porters has been recognized historically since December, 1918. Train porters have been organized and represented for collective bargaining purposes since 1921. They are now represented by the Association of Railway Trainmen and Locomotive Firemen by reason of election and certification by the Mediation Board. The contract between that association and Frisco was entered into on October 7, 1955 and apparently is still in effect.[1] Train porters and brakemen have never been represented by the same labor organization.

The job of train porter has been available only to Negroes. Although a substantial majority of brakemen are white, it is a fact that Negroes have been employed as brakemen.[2] Indeed, Simon L. Howard was employed as a brakeman by Frisco in 1914. He was transferred to the job of train porter, at his request, because of an injury.

The gist of appellant's argument is that the denomination and classification "train porter" is applied only to Negroes; that it is therefore a racial classification, and the federal courts have jurisdiction to grant a remedy. It is further argued that racial discrimination may not

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[1] The term of the agreement recites that "[t]his agreement shall be effective October 1st, 1955, and shall continue in effect until it is changed or modified in accordance with the provisions of the Railway Labor Act, as amended". The record is void of any such change or modification.

[2] The affidavit of the General Secretary and Treasurer of Brotherhood shows the qualifications for membership; that many Negroes are members of the Brotherhood, having been admitted to membership of various local lodges within whose jurisdiction they are respectively employed; "That he is unable to state the number of Negro members of the Brotherhood of Railway Trainmen for the reason that the records of individual members maintained by the Brotherhood contain no designation or indication as to race".

be practiced under the aegis of the Railway Labor Act. *Baker* v. *Carr*, 369 U.S. 186 (1962); *Graham* v. *Brotherhood of Firemen*, 338 U.S. 232 (1949); *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood*, 323 U.S. 210 (1944); *Dillard* v. *Chesapeake & O. Ry. Co.*, 199 F.2d 948 (4 Cir. 1952); *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d 473 (4 Cir. 1951) are cited and relied upon.

Steele, supra, the principal case relied upon by appellant, involved racial discrimination. Steele, a Negro, was a locomotive fireman but not a member of the Brotherhood of Locomotive Firemen and Enginemen, the exclusive bargaining representative of the entire craft of firemen. The Supreme Court held that the language of the Railway Labor Act imposed a duty on the bargaining representative of the craft to exercise, without hostile discrimination, the power conferred upon it by the Act on behalf of all firemen irrespective of whether they were union members or not. Failure to exercise this duty, was held to give rise to a cause of action under the Act. In our case, the Brotherhood has never represented the train porters. This craft has selected its own bargaining representative and such representative has been certified by the Mediation Board, in accordance with the provisions of the Act.

We deem it unnecessary to discuss the other cases relied upon by appellant. They are clearly distinguishable and are not dispositive of the jurisdictional question.

The courts have, without exception, held that under the Railway Labor Act *only* the Mediation Board has the power to make craft or class determinations. *Railroad Trainmen* v. *Howard*, 343 U.S. 768 (1952); *Switchmen's Union* v. *Board*, 320 U.S. 297 (1943); *Brotherhood of Railway & S.S. Clerks* v. *United Air Lines*, 325 F.2d 576 (6 Cir. 1963); *UNA Chapter, Flight Eng. I. Ass'n.* v. *National Mediation Bd.*, 294 F.2d 905 (D.C. Cir. 1961);

cert. den. 368 U.S. 956; *Order of Railway Cond. & Brake.* v. *Switchmen's Union*, 269 F.2d 726 (5 Cir. 1959) cert. den. 361 U.S. 899; *Hester* v. *Brotherhood of Railroad Trainmen*, 206 F.2d 279 (8 Cir. 1953).

In *Howard*, supra, the Brotherhood sought to invade the positional field of train porters, and take over their jobs. Racial discrimination was an important factor in the case. In refusing to sanction the agreement between Frisco and Brotherhood, we stated, in part, 191 F.2d at p. 445: "The agreement reached out to take over, by forced action, * * * the entire positional field of another craft, with the * * * inevitable, and so legally intended, result that that 40-year established and recognized separate craft would be pushed off the Railway and cease to have existence".

On certiorari the Supreme Court stated "the basic pattern of racial discrimination in this case is much the same as that we had to consider in *Steele* v. *L. & N. R. Co.*, 323 U.S. 192 * * *.

As previously noted, these train porters are threatened with loss of their jobs because they are not white and for no other reason. The job they did hold under its old name would be abolished by the agreement; their color alone would disqualify them for the old job under its new name", 343 U.S. at pp. 772, 773. In remanding the case to the District Court, the Supreme Court was careful to point out:

> "Bargaining agents who enjoy the advantages of the Railway Labor Act's provisions must execute their trust without lawless invasions of the rights of other workers. We agree with the Court of Appeals that the District Court had jurisdiction to protect these workers from the racial discrimination practiced against them. On remand, the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other

similar discriminatory bargaining device to oust the train porters from their jobs. In fashioning its decree the District Court is left free to consider what provisions are necessary to afford these employees full protection from future discriminatory practices of the Brotherhood. However, in drawing its decree, the District Court must bear in mind that *disputed* questions of reclassification of the craft of 'train porters' are committed by the Railway Labor Act to the National Mediation Board. *Switchmen's Union* v. *National Mediation Board, supra.* Id. at pp. 774, 775."

Pursuant to the mandate of the Supreme Court, the District Court entered a decree permanently enjoining Brotherhood and Frisco from using the agreement of March 7, 1946 "and any other discriminatory bargaining device to oust plaintiff and * * * his class * * * from their jobs on said railroad as train porters". The Brotherhood was also permanently enjoined from using the statutory position as collective bargaining representative of the craft or class of brakemen on the Frisco "to discriminate against the plaintiff and his class in the performance of their duties as train porters, and particularly in the performance of any duties ordinarily classified as those pertaining to the duties or functions of brakemen on passenger trains".

The train porters were dissatisfied and appealed. Their position was that in our first opinion, 191 F.2d 442, we had held that the agreement effected a consolidation of the two previously existing but virtually identical positions and crafts and of the membership of both, and that the court had erred in failing to so decree. In refusing to accept this theory, we stated that inclusion of such a provision in the decree, would constitute "an intrusion by the court into the forbidden domain of '*disputed* questions of reclassification of the craft of "train porters".' ", 215 F.2d at p. 693.

Appendix A—Opinion of the United States Court of Appeals

We regard the foregoing pronouncements of the Supreme Court and this court as dispositive of the right and power of courts to engage in the process of classifying of different crafts within the railroad industry. That matter has been committed by the Railway Labor Act to the Mediation Board.

The fact is appellant has not properly invoked the services of the Mediation Board, and has not instituted proceedings under Section 2, Ninth, of the Railway Labor Act. Under date of January 8, 1953, a lawyer who represented Howard and his class in the prior litigation, communicated by letter with Mediation Board. The letter reviewed at length the factors which the lawyer regarded as forming a premise for reclassification. Specific recognition was made of the impact of the Supreme Court's holding that the disputed questions of reclassification are committed to the Mediation Board. The secretary of the Mediation Board responded to the communication and concluded his reply with this statement:

> "It will therefore be seen that the Board is not in position to make a ruling on the question of a proper classification of porter-brakemen employed by the St. Louis-San Francisco Railway Company *in the absence of appropriate application for its services under Section 2, Ninth, of the Railway Labor Act*". (Emphasis Supplied).

As we read the record, the January 8, 1953 letter constitutes the sole effort made by appellant to invoke the services of the Mediation Board. This being the situation, there is no factual foundation for the suggestion that the Mediation Board has denied jurisdiction to act. The question whether judicial power may ever be exerted to require the Mediation Board to exercise the duty imposd upon it under Section 2, Ninth, (a question reserved in *General Committee* v. *M.-K.-T. R. Co.*, 320 U.S. 323, 336

f.n. 12 (1943), was resolved in *Railway Clerks* v. *Employees Assn.*, 380 U.S. 650 (1965). In that case, the Supreme Court reiterated that the Railway Labor Act precludes judicial review of the Mediation Board's certification of a collective bargaining representative, but that the Board's action is reviewable only to the extent of the question of the board's performance of its statuotry duty.

We have every reason to believe that the Mediation Board, upon proper petition, would exercise its jurisdiction and competently determine any dispute between appellant and the Brotherhood.

We are aware that the attrition of railway passenger business has had an economic impact on train porters. The membership of this craft has declined and the jobs of those remaining are in jeopardy. But other crafts in the railroad industry have experienced a similar fate. It is common knowledge that dieselized power which permits longer and heavier freight trains, the inroads of truck transportation, and, more recently, Arbitration Award 282, resulting from Public Law 88-108, 77 Stat. 132, 45 U.S.C.A. § 157, note, have had the effect of eliminating brakemen assignments in freight and passenger service. Thus, it would appear that the reclassification of the craft of "train porter" to the craft of "brakemen" could result in further job losses by brakemen. But since the courts are prohibited from intruding into the "forbidden domain of disputed questions of reclassification" of crafts of the industry, we refrain from considering the economic effect that reclassification might have upon brakemen and train porters.

As we have hereinabove indicated, appellant also sought relief from alleged practices in the handling of troop trains (Paragraph 14 of amended complaint). He alleged that "defendants have agreed to replace full passenger

crews, with freight crews on troop trains, thereby terminating the services of Negro 'train porters' who are restricted to service on passenger trains. * * * By the aforesaid acts, defendants have violated their statutory duties under the Railway Labor Act". In Paragraph 15 appellant alleged that on three specified dates in March, 1962, on March 23, 1960 and on other dates throughout the past 10 years, Frisco, with acquiescence and conspiratorial participation of Brotherhood, assigned white brakemen to duties usually performed by train porters; that appellees had thereby abrogated property and seniority rights of train porters. We noted at the outset that Paragraphs 14 and 15 precipitated discovery proceedings. Seemingly, all parties were afforded adequate opportunity to fully explore the factual bases for the claims.

Appellant's brief in this court, has been of little assistance. Instead of pin-pointing the claimed errors of the District Court, appellant has approached the Paragraphs 14 and 15 claims in vague generalities, and has cited abstract principles of law without demonstrating their applicability to the questions at hand. We have nonetheless examined the pleaded claims in the light in which they were apparently presented to the court below.

The troop train incidents occurred prior to the first Howard litigation. Appellant concedes as much in his brief. The change over whereby passenger crews were replaced by pool freight crews, having occurred in April, 1946, was a matter that could have been litigated in the prior Howard case. Indeed, this record shows evidence establishing the change over was introduced in that case. Evidently, Howard and the other train porters did not, at that time, consider the troop train incidents of sufficient importance to require action by the courts. Examination of the complaint filed in the District Court, and the briefs filed in this court, reveals that the present controversy was not a pleaded issue, was not drawn to

the attention of this court, and no relief was sought from the presently claimed invasion of the rights of the train porters. Although we do not impugn the good faith or motives of appellant, we are unable to attach any validity to the belated attempt to seek redress from the asserted wrongful acts.

The last contract between Frisco and Brotherhood, effective September, 1950, provides that passenger crews are to be replaced with freight crews on troop trains. The extent, if any, to which freight crews have handled troop trains pursuant to the 1950 contract, is not clear. The record does demonstrate, however, that the agreement to use pool freight crews was not intended to displace Negro train porters. The District Court so found. *Page 1014 of 244 F. Supp.*

If we were to assume that the replacing of passenger crews by freight crews resulted from discrimination, an assumption not warranted by this record, the question would remain whether, in view of the existing injunction, appellant would be entitled to the relief he seeks in this action. Under the decree entered in the prior Howard litigation, Frisco and Brotherhood are permanently enjoined from using any discriminatory bargaining device to oust members of the class or craft of train porters from their jobs on the railroad. The general rule is that a party who obtains a permanent injunction cannot, while that decree is in full force, have a standing in court to obtain a second decree for the same relief, absent a showing that the first decree was obtained by collusion, and was therefore a fraud on the court. *28 Am. Jur., Injunctions, § 320; 43 C.J.S., Injunctions, § 27.*

The facts in regard to the incidents complained of in Paragraph 15 of the complaint are fully and accurately set forth in the District Court's opinion. *Page 1014 of 244 F. Supp.* We adopt the court's factual statement, and

concur in its considered and soundly reasoned disposition of this issue.

The record fails to establish a pattern of discrimination, or collusive action between Frisco and Brotherhood. The few isolated incidents complained of involved emergency situations requiring the exercise of on-the-spot managerial discretion. The testimony of some of the train porters establish that the assignments in question resulted from cancellation of runs, or make up of emergency crews necessitated by train wrecks.

Section 3, First (i) of the Railway Labor Act, (45 U.S.C.A. § 153, First (i)) provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

In discussing the nature of disputes between railway companies and employees, dealing with the rights of the parties, the Supreme Court in *Elgin, J. & E.R. Co.* v. *Burley*, 325 U.S. 711, 723, 724, stated:

> "The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular

provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e.g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world. The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the process of noncompulsory adjustment.

The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment * * * Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment."

See also *St. Louis, S.F. Ry. Co.* v. *Railway Yardmasters of America,* 328 F.2d 749, (5 Cir. 1964) cert. den. 377 U.S. 980.

Beyond doubt the Paragraph 15 complaints are "minor" disputes within the meaning of the Act. This being so the train porters were required, as a prerequisite to relief in the federal courts, to pursue their remedies in accordance with the procedures embodied in their labor agreement, and the provisions of the Railway Labor Act. We agree with Frisco's suggestion that "(i)f Appellant and other train porters had been denied a work right on any occasion, they

would have possessed the right to 'time-slip' this Appellee, and Frisco could have no control over their proceeding in this manner.'" *Locomotive Engrs.* v. *L. & N. R. Co.*, 373 U.S. 38 (1963), holding that "(t)he several decisions of this Court interpreting § 3, First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes. The right of one party to place the disputed issue before the Adjustment Board, with or without the consent of the other, has been firmly established."

None of the train porters ever progressed a time claim to the Adjustment Board, or pursued any contractual or statutory remedies. Having failed to exhaust their contractual and administrative remedies, appellant is precluded from resorting to the federal courts for resolution of the Paragraph 15 grievances. *Neal* v. *System Board of Adjustment*, 348 F.2d 722 (8 Cir. 1965); cf. *Republic Steel* v. *Maddox*, 379 U.S. 650 (1965).

We have pondered all of the contentions and arguments of appellant, and are satisfied that no rational basis exists for disturbing the judgment appealed from. Accordingly, we affirm.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

Memorandum Opinion

(Filed in U. S. District Court December 30, 1963.)

Plaintiff brought this action on behalf of himself and on behalf of a class of Negro employees of the defendant Railway, who are similarly situated because of employment, race and color, for a declaratory judgment, injunction and damages. Plaintiff seeks to state a claim arising under 45 U. S. C., Section 151 et seq., and invokes jurisdiction of the Court pursuant to 28 U. S. C., Sections 1331 and 1337. The matter is now before the Court on Motion of Brotherhood of Railway Trainmen for Summary Judgment; and Motions of St. Louis-San Francisco Railway Company to Dismiss or for Summary Judgment. The Motions for Summary Judgment are based upon the complaint, admissions, answers to interrogatories, and a number of affidavits and exhibits including contracts, employment applications, and portions of the record and decisions in the prior litigation between these parties. The stated grounds for the separate motions are (1) res judicata, (2) lack of jurisdiction over the controversy and (3) failure to state a claim upon which relief can be granted.

The complaint states two general grounds for the basis of the action: (1) the maintenance of separate classes or crafts of "brakemen" and "train porters" by the defendants through recognition of the separate classes or crafts and bargaining between the defendants on behalf of "brakemen" to the exclusion of "train porters", and (2) the alleged discriminatory basis of the contract of 1950 determining the assignment of brakemen on troop trains and other specific instances of discriminatory assignment of jobs.

The complaint sets out that the Brotherhood of Railway Trainmen (hereinafter referred to as the "defendant

Brotherhood") is the recognized bargaining agent of the craft or class of "brakemen" employed by the defendant Railway, that the plaintiffs are employed by the defendant Railway to perform brakemen duties but are designated "train porters". Plaintiff pleads that the designation of his class as "train porters" is an artificial and arbitrary distinction based solely on race and continues as the result of the collusion and agreement of the defendants. Because of the artificial designation, it is pleaded, plaintiff and his class receive renumeration unequal to that of the "brakemen" even though they perform similar work, and they are refused representation by the defendant Brotherhood. The complaint further alleges that the defendant Brotherhood has demonstrated hostility toward the plaintiff over the years, having concluded a contract in 1946 with defendant Railway which would effect the discharge of plaintiff and others designated as "train porters". Pursuant to litigation brought by plaintiff, the contract was voided.

Plaintiff further alleges that he has sought relief of the defendant Railway, requesting them to discontinue the classification of "train porters" and readjust and establish their status in the ranks of "brakemen".

Plaintiff pleads that he has sought relief from the National Mediation Board but that the Board refused to reclassify the craft class as no representational dispute was presented nnder Section 2, Ninth of the Railway Labor Act. Plaintiff sought relief under Section 2, Sixth of the Act, seeking a change of working conditions and rates of pay, but because the defendant Railway refused mediation on the ground that the contract with defendant Brotherhood precluded the relief sought by plaintiffs, the proceedings came to an end.

Plaintiff further alleges that he has sought membership in defendant Brotherhood but was denied admission on the ground that he was a "train porter", that defendant

Brotherhood fails to fairly represent plaintiff and his class even though they do "brakemen" duties, solely because of their race and color; and that the defendant Brotherhood uses its position and authority under the Railway Labor Act to perpetuate a craft limited to white "trainmen" thereby denying plaintiff and his class rights of employment and property and fair representation under the Act. It is alleged that defendant Railway has knowledge of the hostility toward plaintiff of defendant Brotherhood; has participated in the discriminatory practices, and has agreed to the collective bargaining agreement now existing which effects the continuance of the discriminatory circumstances.

Plaintiff admits in answer to interrogatories that the Association of Railway Trainmen and Locomotive Firemen was certified as collective bargaining agent for the "train porters" pursuant to an election under Section 2, Ninth, of the Railway Labor Act in 1954.

The only specific instances of alleged hostile discrimination, beyond that alleged to exist by the very framing of the crafts or class, is set out in paragraphs 14 and 15 of the amended complaint. In paragraph 14, plaintiff alleges that by a contract effective in September, 1950, the defendants agreed, without notice to plaintiff and his class, to displace "train porters" with "brakemen" on troop trains. In paragraph 15, plaintiff asserts that on specified dates in 1960 and 1962 and other dates, the defendants, in conspiracy, assigned "brakemen" to jobs formerly and usually performed by "train porters", thereby abrogating and interfering with property and seniority rights of plaintiff or members of his class.

Plaintiff prays for judgment declaring the rights of the parties and declaring the agreements, practices, and policies of the defendants invalid and unenforceable insofar as they deprive plaintiff and his class of seniority and employment rights and job assignments and restoring and

advancing them to such status as they would be entitled to absent the alleged void agreements; that the Court issue an injunction enjoining the defendant Brotherhood from using its position and authority under the Railway Labor Act to perpetuate a white craft and enjoining defendant Railway from participating in such discriminatory practices; enjoining defendant Brotherhood from refusing membership in it to plaintiff and his class; enjoining defendants and all officers, agents, and employees from effecting, enforcing or complying with any agreements, policies or practices or any action which have unlawful, discriminatory effect; and for damages for loss of wages.

In the prior Howard case, Cause No. 4452, plaintiff brought an action on behalf of himself and the class he represents for a judgment declaring a contract existing between the defendants, which would effect the discharge of plaintiff and members of his class, void, and for an injunction enjoining the defendants from effectuating the provisions of the contract. Plaintiff's action in the prior Howard case was based in part upon allegations which assumed a duty on the part of the defendant Brotherhood to represent plaintiff and his class as brakemen and alleged the failure of the defendant Brotherhood to fairly and adequately represent the plaintiff and his class, and that the defendant Brotherhood discriminated against them in favor of the white brakemen who were or could be dues paying members of the Brotherhood. In that case, as in this case, the plaintiffs were represented by another union of their own choosing.

The course of the prior Howard case and the decisions of the various courts in that case, leaves no question that this court lacks jurisdiction insofar as the present action seeks a reclassification of the craft of "train porters". The District Court in the prior Howard case found that the controversy insofar as it sought representation by the defend-

ant Brotherhood was in the exclusive jurisdiction of the National Mediation Board. The District Court further found that the controversy involved a jurisdictional dispute as to performance of functions of brakemen by train porters which was, in the first instance, a question for the National Railroad Adjustment Board. 72 F. Supp. 695. While the Court of Appeals for the Eighth Circuit reversed the judgment (except as to an issue not involved here), the basis of the reversal was upon the ground that the dispute was not a normal jurisdictional dispute but rather the predatory take over of the total positions of a forty year old craft for the purpose of abolition of the craft without legal basis. As such the agreement had no legal effect under the Railway Labor Act and was unlawful and unenforceable. The Court of Appeals held that the agreement could be given legal effect only if it were treated as a merger of the crafts and resulted in the assimilation of the "train porters" in the craft of "brakemen" with fair and equal representation by the defendant Brotherhood. 191 F. 2d 442. Appeal was taken by the Brotherhood to the Supreme Court. The Supreme Court affirmed the decision of the Court of Appeals reversing the District Court but in so doing, stated, 343 U. S. 768, 775:

> "On remand the District Court should permanently enjoin the Railroad and the Brotherhood from use of the contract or any other similar discriminatory bargaining device to oust the train porters from their jobs. In fashioning its decree the District Court is left free to consider what provisions are necessary to afford these employees full protection from future discriminatory practices of the Brotherhood. However, in drawing its decree, the District Court must bear in mind that disputed questions of reclassification of the craft of 'train porters' are committed by the Railway Labor Act to the National Mediation

Board. **Switchmen's Union v. National Mediation Board**, supra."

Thereafter, the District Court filed its judgment declaring the 1946 contract void and issued an injunction field June 10, 1953, which enjoined the defendants "from using the agreement of March 7, 1946, and any other discriminatory bargaining device to oust plaintiff and those of his class similarly situated from their jobs on said railroad as train porters", and enjoining the defendants "from using its statutory position as collective bargaining representative under the Railway Labor Act of the craft or class of brakemen on the St. Louis-San Francisco Railway Company to discriminate against the plaintiff and his class in the performance of their duties as train porters and particularly in the performance of any duties ordinarily classified as those pertaining to the duties or functions of brakemen on passenger trains".

The plaintiff was dissatisfied with the extent of the judgment and filed a motion with the Court of Appeals seeking to require the decree to include a provision providing that the contract of 1946 be accorded legal effect as a merger of the two crafts. The Court of Appeals, at 215 F. 2d 690, 692, interpreted the Supreme Court's opinion as concluding that such effect was intended by the previous Court of Appeals opinion to be permissive, only and conditional upon the willingness of all the parties. Further, the Court of Appeals interpreted the Supreme Court as saying in its opinion, that without such agreement of the parties, the question of craft division was a "disputed question" of reclassification committed by the Railway Act to the National Mediation Board.

Before the Court of Appeals considered the second round of the Howard case, it considered the question of jurisdiction to determine class or craft classification in

Hester v. Brotherhood of Railroad Trainmen, 206 F. 2d 279. The Court held that that question was not open to anyone to resolve except the National Mediation Board. That case was similar to the facts alleged in the instant case in that the plaintiffs were members of a class, with a certified bargaining representative other than the defendant. The plaintiffs in that case as in this case, sought to be treated as members of the "brakemen" craft and represented by the representative of that craft. The Brotherhood had never regarded plaintiffs as a part of its craft or sought to represent them. The Court stated, page 282. "And until the plaintiffs have sought and obtained from the Mediation Board such an establishment of their claimed and disputed craft status, they necessarily are without any foundation in the situation for legally sustaining the critical allegation on which their suit is attempted to be rested".

The Hester case was based upon hostile discrimination, though not racial discrimination. The Court of Appeals for this Circuit, however, has declined to recognize a legal distinction between different types of irrelevant and invidious discrimination. **Haley v. Childers,** 314 Fed. 2d 610.

The judgment in the prior Howard case disposes of the issue of jurisdiction of this Court over class or craft classification. Unless the law has changed as to this issue—and plaintiff cites no cases which can be deemed to effect such a change—the question is judicially determined as to these parties and the facts involved in this case and the plaintiff is estopped from relitigating the issue.

Plaintiff's complaint, nevertheless, presents a claim with fact questions to be determined. The specific instances of discrimination in job assignments through concerted action or design of the defendants alleged in paragraphs fourteen and fifteen state a new cause of hostile discrimination under the Railway Labor Act. The alleged discriminatory assignments will require evidence additional and distinct

from evidence which would support the action in the prior Howard case. The determination that the contract of 1946 was void has no conclusive effect on the question of whether the contract alleged in paragraph fourteen regarding assignment of brakemen on troop trains is void. It may be that the alleged acts are the result of lawful bargaining and based upon relevant, valid distinctions. On the other hand, proof is required to show whether the sole basis of the contract and practices is racial difference and the sole purpose is the displacement of negro employees with white employees.

The evidence may show that the real dispute as to these matters is one of the jurisdiction of the separate crafts over jobs, and, therefore, a question for the National Adjustment Board. But this Court has jurisdiction to determine whether hostile racial discrimination has been the foundation of unlawful invasions of job rights of plaintiff or members of the class he represents.

Dated this 30th day of December, 1963.

/s/ JOHN K. REGAN,
U. S. District Judge.

Order

(Filed in U. S. District Court December 30, 1963.)

This matter is pending on motion of Brotherhood of Railway Trainmen for Summary Judgment and motions of St. Louis, San Francisco Railway Company to Dismiss or for Summary Judgment. In accordance with the Court's Memorandum filed this 30th day of December, 1963, delineating the issues remaining to be litigated,

IT IS ORDERED that all of said motions are denied.

Dated this 30th day of December, 1963.

/s/ JOHN K. REGAN,
U. S. District Judge.

APPENDIX C

Memorandum Opinion

(Filed in U. S. District Court August 10, 1965.)

This action, brought on behalf of plaintiff individually and on behalf of a class of Negro employees of the St. Louis-San Francisco Railway Company, seeks a declaratory judgment, injunctive relief and damages against the Railway and the Brotherhood of Railway Trainmen. Jurisdiction of this Court is invoked under 28 U. S. C., Sections 1331 and 1337, the claim assertedly arising under the Railway Labor Act, 45 U. S. C., Sections 151 et seq. Plaintiff attempts to rest his suit upon allegedly hostile descrimination, practiced for the purpose of unlawfully invading the employment and security rights of plaintiff and other members of his class.

Motions for summary judgment filed by both defendants were ruled in our memorandum opinion of December 30, 1963. In effect, we then held that only the specific charges of discrimination in job assignments alleged in paragraphs 14 and 15 of the Amended Complaint presented fact issues for determination, and for that reason overruled the motions.

Defendants have now filed new motions for summary judgment, basing the motions in part upon the same documents, affidavits and exhibits set forth in the prior motions and additionally upon new exhibits, affidavits and depositions. Plaintiff has not filed any counter-affidavits. However, subsequent to the submission of defendants' motions, plaintiff moved to strike the motions for summary judgment, alleging that the facts are peculiarly within the knowledge of defendants and that if given time to take the depositions of defendants' officers, he will be able to counteract the affidavits. Depositions were thereafter taken by plaintiff and filed in this cause. They

have been considered by the Court in ruling the present motions.

For many years, Negro employees of the Railway such as plaintiff have been known and designated as train porters. Although the present record does not affirmatively so show, it would appear that when the classification of train porter was established, their principal duties "were cleaning the cars, assisting the passengers, and helping to load and unload baggage," and only a relatively small part of their duties were those of brakemen. See opinion of Minton, J., dissenting in **Brotherhood of Railroad Trainmen v. Howard**, 343 U. S. 768, l. c. 776.[1] No doubt the attrition of passenger service contributed to the increasingly smaller percentage of time necessary for train porters to devote to strictly train porter duties, with the result that some years ago it became economically unfeasible for the carrier to continue the employment of train porters unless they were required to perform additional duties ordinarily performed by the craft of brakemen.

The latter course was followed, so that for many years strictly train porter duties have occupied only a relatively minor portion of their time, and for the most part their work has entailed essentially the performance of functions of a head-end brakeman on passenger trains. This portion of brakemen's duties thus became part of the "positional field" of train porters. However, they were still train porters doing, in part, and on passenger trains only, the work of another craft. In any event, the Rail-

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[1] We note, in this connection, that plaintiff Howard was originally employed as a brakeman. At his own written request made in December 1917, he was transferred to the job of "train porter" on his representation that because of injury he was unable to work as a brakeman. All other members of the class made written applications for employment as "train porters," and were employed as such.

way has for many years consistently treated and dealt with train porters as a class of employees separate from brakemen, and the Brotherhood has refused to consider them as brakemen or to represent them as such. It is also conceded that train porters are, and for many years have been represented by another union of their own choosing, the Association of Railway Trainmen and Locomotive Firemen, which has been certified as their collective bargaining agent pursuant to an election under Section 2, Ninth, of the Railway Labor Act, and which has negotiated contracts with the Railway on their behalf.

It is quite evident, both from the amended complaint and the briefs, that what plaintiff really seeks, on behalf of himself and the other train porters employed by Railway, is a reclassification of the craft or class of "train porters" to that of brakemen. If this reclassification can be accomplished, the alleged hostile racial classification of which plaintiff now complains will be eliminated. The Brotherhood, as representative of the craft or class of "brakeman" would in such event be required to represent and protect, without discrimination, the interests of all members of that class, including the former "train porters," whether or not the "train porters" were members of the Brotherhood. **Steele v. Louisville & Nashville R. Co.**, 323 U. S. 192. Whatever advantageous contractual provisions have been negotiated by the Brotherhood on behalf of brakemen as a class would then be equally applicable to those brakemen who had formerly been classified as "train porters."

At plaintiff's insistence, we have concluded to rule the issue of reclassification de novo. In the prior **Howard** case, the District Court had held that it had no jurisdiction to determine whether train porters should be classified as brakemen and represented by the Brotherhood, such question being within the exclusive jurisdiction of

the National Mediation Board. The Court further found that the controversy, insofar as it related to the right to perform the functions of brakemen, was a jurisdictional dispute which only the National Railroad Adjustment Board had jurisdiction to decide. **Howard v. Thompson,** D. C. Mo., 72 F. Supp. 695. In reversing the judgment, the Court of Appeals held that the 1946 agreement and its use did not involve the ordinary situation of jurisdictional dispute, but rather constituted the forced take over of the entire positional field of another craft, and as such could be valid only if given effect as "a merging of the two **previously separate** but similar crafts and an accompanying assimilation of the members of the consolidated craft into the annexing craft." **Howard v. St. Louis-San Francisco Railway Co.**, 8 Cir., 191 F. 2d 442.[2]

On certiorari to the Supreme Court, that Court held that the District Court had jurisdiction to protect the train porters from racial discrimination practiced against them by the unlawful use of power granted by the Railway Labor Act, and made clear that the Brotherhood, as the statutory bargaining agent of the brakemen, may not use its powers as such to practice racial discrimination against members of **another class** of employees. The racial discrimination there involved (the attempted predatory take over by the Brotherhood of the jobs of train porters) was held to be unlawful "whether colored employees are classified as 'train porters,' 'brakemen,' or something else." For that reason, the Court ordered that the Railroad and

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[2] That the Court of Appeals actually intended to accord the agreement its valid judicial effect as an assimilation of the two crafts is emphasized in *Hester* v. *Brotherhood of Railroad Trainmen,* 8 Cir., 206 F. 2d 279, footnote 2, l. c. 282. However, the Supreme Court regarded the opinion as holding that the agreement could be treated as valid only upon the condition that the Railroad and the Brotherhood were willing to recognize the "train porter" as member of the craft of "brakemen," but not otherwise.

the Brotherhood be permanently enjoined from using the 1946 contract there in question (which provided that train porters shall no longer perform any brakemen's duties, thereby in effect abolishing train porter jobs) "or any other discriminatory bargaining device to oust the train porters from their jobs" (343 U. S., l. c. 775).

The basic premise upon which the Court of Appeals ruled the first **Howard** case was that there were in fact two separate crafts—"train porter" and "brakeman"—and that the 1946 agreement under attack "reached out to take over, by forced action, the entire positional field" of the "40-year established and recognized **separate** craft." The Court of Appeals then pointed out (191 F. 2d, l. c. 445) "What the agreement therefore was meant to do was to compel the Railway to get rid of the position of train porter on its **passenger** trains and to establish the position of head-end brakemen in its stead." (Emphasis supplied.)

The Supreme Court did not reach this issue, but irrespective of classification, held simply that the "Federal Act thus prohibits bargaining agents it authorizes from using their position and power to destroy colored workers' jobs in order to bestow them on white workers." In the words of Minton, J., dissenting, "The majority reaches out to invalidate the contract, **not** because the train porters are brakemen entitled to fair representation by the Brotherhood, but because they are Negroes who were discriminated against at the behest of the Brotherhood. To emphasize the limited scope of its decision, the Supreme Court additionally ruled:

> "In fashioning its decree the District Court is left free to consider what provisions are necessary to afford these employees full protection from **future** discriminatory practices of the Brotherhood. However, in drawing its decree, the District Court must

> bear in mind that **disputed** questions of reclassification of the craft of 'train porters' are committed by the Railway Labor Act to the National Mediation Board. **Switchmen's Union v. National Mediation Board,** *supra* (320 U. S. 297)."

Even the minority on the Court was in accord on the question of jurisdiction, although disagreeing with the majority's view that the dispute did not "hinge on the proper classification of the porter so as to call for settlement by the National Mediation Board under our holding in **Switchmen's Union v. National Mediation Board,** 320 U. S. 297." The dissenting opinion stated:

> "I think there was a dispute here between employees of the carrier as to whether the Brotherhood was the representative of the train porter, and that this is a matter to be resolved by the National Mediation Board, not the courts."

After the District Court, on remand of the first **Howard** case, entered its final decree in the earlier **Howard** case, plaintiff appealed to the Court of Appeals the District Court's refusal to accord to the 1946 agreement the legal effect of "a consolidation of the positions and crafts of brakeman and train porter and of the membership of the two crafts." In ruling against plaintiff, the Court of Appeals held that the decree he sought "could hardly, in terms of the Railway Labor Act and in the language of the Supreme Court's opinion, be regarded as being anything else, for purpose of the present situation, than an intrusion by the Court into the forbidden domain of **'disputed'** questions of reclassification of the craft of 'train porters'."

In Hester v. Brotherhood of Railway Trainmen, 8 Cir., 206 F. 2d 279, in ruling a contention that messenger-

baggagemen should be regarded as belonging or entitled to belong to the craft of brakemen represented by the Brotherhood, the Court said,

> "And until the plaintiffs have sought and obtained from the Mediation Board such an establishment of their claimed and disputed craft status, they necessarily are without any foundation for legally sustaining the critical allegation on which their suit is attempted to be rested."

In **UNA Chapter, Flight Engineers' Int'l. Assn. v. National Mediation Board**, D. C. Cir., 294 F. 2d 905, an attempt to obtain a judicial review of an order of the National Mediation Board delineating a bargaining class was ruled in this manner:

> "The Court did not err when it dismissed the complaint for lack of jurisdiction. Under the Railway Labor Act only the NMB (or the committee designated by it) has the power to make a craft or class determination. Switchmen's Union of North America v. N. M. B., 1943, 320 U. S. 297, 64 S. Ct. 95, 88 L. Ed. 61. The right given to employees is that of designating, by a majority of those comprising a 'craft or class', their representatives. See 320 U. S. at pages 300-301, 64 S. Ct. at pages 96-97. It has become well settled that in making 'craft or class' determination, the NMB may regroup, amalgamate, or splinter 'historic' bargaining groups, taking into account technological and functional changes, and that the decision of the Board in setting up a 'class' for representation in a jurisdictional dispute, is unreviewable in the courts."

To place the present case in proper perspective it is helpful to bear in mind that what Howard really decided

was that Brakeman could not forcibly take over the positional field of train porters, that is, could not **displace** them from **their** jobs.

What then was (and is) the "positional field" of the "class of positions and employees known as 'train porters'"? In the words of the Court of Appeals: "The essence of the duties of this class or craft has always been the performance of the necessary braking work on the head end of Frisco's **passenger** trains." Hence, what plaintiff is proposing in the present action is a reclassification of his class or craft which would result in an **enlargement** of his "positional field," and a take over of part of the positional field of brakemen, with the result that instead of train porters being displaced from **their** jobs (as in the first **Howard** case), brakemen presently employed on freight trains would conceivably be displaced by the former train porters if permitted to carry over their accumulated seniority—a kind of discrimination in reverse. We are not, of course, ruling the propriety of such reclassification on the limited facts before us, being convinced that we lack jurisdiction to decide that question.

We rule and hold, as we did in our former opinion, therefore, that although this Court has jurisdiction to decide the issue of hostile racial discrimination as such (that is, "whether hostile racial discrimination has been the foundation of unlawful invasions of job rights") it has no jurisdiction to determine whether "train porter" is a proper class or craft classification for employees whose duties in the large part are now the same as those of brakemen.

Plaintiff argues that the Court should exercise jurisdiction on the ground there is in fact no administrative remedy and that the Supreme Court was mistaken in remitting plaintiff to the National Mediation Board for

relief. In this connection, the complaint alleges that the train porters sought relief against the Railroad from the National Mediation Board with respect to their classification, but that the Board "declined to take jurisdiction on the ground that reclassification was cognizable only in a jurisdictional dispute under Section 2, Ninth of the Railway Labor Act, despite the Supreme Court's statement that reclassification was committed to the National Mediation Board." The refusal of the Board to act, whether right or wrong under the circumstances or by reason of the manner and form in which the question of reclassification was presented to it cannot operate to confer jurisdiction on this Court to decide a matter which, under the ruling of the Supreme Court in the prior **Howard** case Congress has withdrawn from our adjudicatory power.

This brings us to paragraphs 14 and 15 of the Complaint. Paragraph 14 complains of an agreement between the defendants, effective in September, 1950, providing that pool freight crews will be used for handling troop trains. The charge is made that the effect of this agreement is to terminate the services of Negro "train porters" who are restricted to service on passenger trains and to replace them with white brakemen. The admitted facts are that the Railway replaced passenger crews with freight crews on troop trains in 1946 and that plaintiff and the other members of his class had knowledge thereof since April, 1946. The record discloses that the change-over from passenger to freight crew consist on troop trains was made by the Railway in 1946 after the temporary restraining order had been issued in the prior **Howard** case, and that testimony respecting these facts was adduced by plaintiff at the trial of that case and was before the Court when the final decree was entered. During the time passenger crews operated troop trains, there were no strictly train porter duties to be performed,

and such trains are more comparable to freight trains than to the usual passenger trains. The fact that freight crews received a higher rate of pay than passenger crews was undoubtedly the reason the Brotherhood sought the change. We find that by making the change there was no intent on the part of defendants to discriminate against train porters who are employed only on passenger trains.

It is true that in 1950, during one of the periodic revisions of the agreement between the Railway and the Brotherhood, there was incorporated therein a provision for using "pool freight crews" for handling troop trains. The record is not clear as to the reasons for apparently formalizing in 1950 the Railway's consistent practice theretofore since April, 1946. Conceivably, the word "pool" may be the clue. In any event, for several reasons, the mere existence of this provision in the current agreement does not entitle plaintiff to the relief now sought. In the first place, any issue concerning the validity of this issue was tried or triable in the first **Howard** action. See **Powell 1. City of Joplin**, 335 Mo. 562, 73 S. W. 2d 408. "Successive injunction suits are not favored." The undisputed fact that plaintiff and the other members of his class sought no relief against the character of the troop train consist although it was known to them since April, 1946, demonstrates their acquiescence in the propriety thereof. Working on troop trains was no part of the "positional field" of train porters. Moreover, the record clearly shows that the agreement to use pool freight crews on troop trains was not intended to displace any Negro employees even though as a result some train porters were no longer able to work on troop trains. Finally, and of decisive importance, if and to the extent the agreement should be deemed discriminatory, neither plaintiff nor any of the members of his class has any need for new injunctive relief in this action. The

judgment in the earlier **Howard** case in terms enjoins both the Railway and the Brotherhood from using not only the 1946 agreement but "**any other discriminatory bargaining device** to oust plaintiff and those of his class similarly situated from their jobs on said railroad as train porters." And the Brotherhood was further enjoined from using its statutory position "to discriminate against the plaintiff in the performance of their duties as train porters." "If complainant has obtained an injunction in one court and that injunction is still in force, a second injunction in that or in another court will be refused." 43 C. J. S., Injunctions, p. 459.

Paragraph 15 of the Complaint has reference to several specific instances on which the Railway allegedly assigned white "brakemen" to perform duties previously and usually performed by Negro "train porters." The record discloses that the matters complained of resulted from unilateral action in emergencies by railway officials in the exercise of judgment and discretion with no participation by the Brotherhood in the making or implementation of the decisions. One such incident resulted from a train wreck on March 17, 1962, which necessitated the annulment of a run. Although the time claim of the train porter based thereon was rejected (on the ground the train porter contract did not support the claim), this indictment has nothing whatever to do with assigning white brakemen to perform "train porter" jobs. In any event, the rejection of the time claim was a grievance as to which the employee had the right to appeal to the National Railroad Adjustment Board, but did not avail himself of the procedure.

Several other unusual emergency situations are complained of. Some resulted from application of the so-called 16 hour law, 45 U. S. C. A., § 62, and others from train wrecks by reason of which the regular train porter would become unavailable. On some such occasions a brakeman would be used as a temporary replacement.

Such situations were isolated and required immediate on-the-spot decisions by railroad officials as to the best course to follow. If an error of judgment was made (assuming that a train porter was then actually available on the extra board and could have been reached in time), there is not the slightest basis for holding that the decisions resulted from any cooperative or conspiratorial action between the Railway and the Brotherhood. The only other complaints under paragraph 15 relate to the reduction of crews on some runs as the result of the decline in passenger traffic and the number of passenger cars in service. In these relatively few instances, the train porter was not replaced, although his job was eliminated. The fact is, however, as the testimony of some train porters reveals, that there is no "pattern" of discrimination, and certainly no collusive action between defendants. There are, in fact, some runs in which the brakemen's job has been eliminated, and his duties taken over either by the conductor or by the "train porter". The isolated incidents of management decisions complained of do not, in our opinion, establish the existence of hostile racial discrimination with respect to which this court should act, nor collusion by the Railroad to aid the Brotherhood in allegedly discriminating against "train porters".

We should add that whatever may have been the racially discriminatory policy and practice of the Brotherhood in the past, as adjudicated in **Howard** and other cases, there is no factual basis in the present record for plaintiff's charge that the Brotherhood presently is guilty of hostile racial discrimination. It is undisputed that Negro brakemen (but not train porters) are admitted to membership in the Brotherhood, and as such are represented by that union. The Brotherhood no longer is

"an exclusively white man's union" (**Howard**, 343 U. S. l. c. 769).

It follows from the foregoing that the separate motions of the Railway and Brotherhood for summary judgment should be and are hereby sustained. All other motions have been mooted by our disposition of the motions for summary judgment.

The Clerk is ordered to enter judgment accordingly.

Judgment

(Filed in U. S. District Court August 10, 1965.)

This matter is pending herein on defendants' motions for summary judgment and a memorandum opinion dated this date is filed herewith and incorporated in this judgment, finding that defendants are entitled to the summary judgment prayed for.

IT IS THEREFORE ORDERED AND ADJUDGED that defendants' motions for summary judgment be and the same are hereby sustained, that plaintiff recover nothing by his suit, and that plaintiff's amended complaint be and it is hereby dismissed at plaintiff's cost.

HAROLD G. PRYCE, Clerk.
By EDW. D. WALSH,
Chief Deputy.

Dated this 10th day of August, 1965.

APPENDIX D

Pertinent text of Railway Labor Act, Title 45, United States Code, Sections 151, et seq.

§ 151. Definitions

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—

* * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

* * *

§ 151a. General purposes

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter

of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions. May 20, 1926, c. 347, § 2, 44 Stat. 577; June 21, 1934, c. 691, § 2, 48 Stat. 1186.

§ 152. General duties—Duty of carriers and employees to settle disputes

First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

CONSIDERATION OF DISPUTES BY REPRESENTATIVES

Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

DESIGNATIONS OF REPRESENTATIVES

Third. Representatives, for the purposes of this chapter, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce

the other in its choice of representatives. Representatives of employees for the purposes of this chapter need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.

ORGANIZATION AND COLLECTIVE BARGAINING; FREEDOM FROM INTERFERENCE BY CARRIER; ASSISTANCE IN ORGANIZING OR MAINTAINING ORGANIZATION BY CARRIER FORBIDDEN; DEDUCTION OF DUES FROM WAGES FORBIDDEN

Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter. No carrier, its officers, or agents shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization, or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided,* That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management dur-

ing working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization.

AGREEMENTS TO JOIN OR NOT TO JOIN LABOR ORGANIZATIONS FORBIDDEN

Fifth. No carrier, its officers, or agents shall require any person seeking employment to sign any contract or agreement promising to join or not to join a labor organization; and if any such contract has been enforced prior to the effective date of this chapter, then such carrier shall notify the employees by an appropriate order that such contract has been discarded and is no longer binding on them in any way.

CONFERENCE OF REPRESENTATIVES; TIME, PLACE; PRIVATE AGREEMENTS

Sixth. In case of dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: *Provided,* (1) That the place so specified shall be situated upon the line of the carrier involved or as otherwise mutually agreed upon; and (2) that the time so specified shall allow the designated conferees reasonable opportunity to reach such place of conference, but shall not exceed twenty days from the receipt of such notice: *And provided further,* That nothing in this chapter shall be construed to supersede the provisions of any agreement (as to conferences) then in effect between the parties.

Appendix D—Pertinent text of Railway Labor Act, Title 45, United States Code, Sections 151, et seq.

CHANGE IN PAY, RULES, OR WORKING CONDITIONS CONTRARY TO AGREEMENT OR TO SECTION 156 FORBIDDEN

Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

NOTICES OF MANNER OF SETTLEMENT OF DISPUTES; POSTING

Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, and in such notices there shall be printed verbatim, in large type, the third, fourth, and fifth paragraphs of this section. The provisions of said paragraphs are made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

DISPUTES AS TO IDENTITY OF REPRESENTATIVES; DESIGNATION BY MEDIATION BOARD; SECRET ELECTIONS

Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify

the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

VIOLATIONS; PROSECUTION AND PENALTIES

Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of the said paragraphs of this section shall constitute a separate offense. It shall be the duty of any United States attorney to whom any duly designated representative of a carrier's employees may apply

to institute in the proper court and to prosecute under the direction of the Attorney General of the United States, all necessary proceedings for the enforcement of the provisions of this section, and for the punishment of all violations thereof and the costs and expenses of such prosecution shall be paid out of the appropriation for the expenses of the courts of the United States: *Provided*, That nothing in this chapter shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this chapter be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent.

§153. National Railroad Adjustment Board—Establishment; composition; powers and duties; divisions; hearings and awards

First. There is established a Board, to be known as the "National Railroad Adjustment Board", the members of which shall be selected within thirty days after June 21, 1934, and it is provided—

(a) That the said Adjustment Board shall consist of thirty-six members, eighteen of which shall be selected by the carriers and eighteen by such labor organizations of the employees, national in scope, as have been or may be organized in accordance with the provisions of section 152 of this title.

(b) The carriers, acting each through its board of directors or its receiver or receivers, trustee or trustees, or through an officer or officers designated for that purpose by such board, trustee or trustees, or receiver or receivers, shall prescribe the rules under which its representative shall be selected and

shall select the representatives of the carriers on the Adjustment Board and designate the division on which each such representative shall serve, but no carrier or system of carriers shall have more than one representative on any division of the Board.

(c) The national labor organizations, as defined in paragraph (a) of this section, acting through the chief executive or other medium designated by the organization or association thereof, shall prescribe the rules under which the labor members of the Adjustment Board shall be selected and shall select such members and designate the division on which each member shall serve; but no labor organization shall have more than one representative on any division of the Board.

* * *

(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

* * *

Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

§ 155. Functions of Mediation Board—Disputes within jurisdiction of Mediation Board

First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may in-

voke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

INTERPRETATION OF AGREEMENT

Second. In any case in which a controversy arises over the meaning or the application of any agreement reached

through mediation under the provisions of this chapter, either party to the said agreement, or both, may apply to the Mediation Board for an interpretation of the meaning or application of such agreement. The said Board shall upon receipt of such request notify the parties to the controversy, and after a hearing of both sides give its interpretation within thirty days.

* * *

§ 156. Procedure in changing rates of pay, rules, and working conditions

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions; and the time and place for the beginning of conference between the representative of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board. May 20, 1926, c. 347, § 6, 44 Stat. 582; June 21, 1934, c. 691, § 6, 48 Stat. 1197.

§ 157. Arbitration—Submission of controversy to arbitration

First. Whenever a controversy shall arise between a carrier or carriers and its or their employees which is not settled either in conference between representatives of the

parties or by the appropriate adjustment board or through mediation, in the manner provided in sections 151-156 of this title, such controversy may, by agreement of the parties to such controversy, be submitted to the arbitration of a board of three (or, if the parties to the controversy so stipulate, of six) persons: *Provided, however,* That the failure or refusal of either party to submit a controversy to arbitration shall not be construed as a violation of any legal obligation imposed upon such party by the terms of this chapter or otherwise.

§ 160. Emergency Board

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter, and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however,* That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

There is authorized to be appropriated such sums as may be necessary for the expenses of such board, including the compensation and the necessary traveling expenses and expenses actually incurred for subsistence, of the members of the board. All expenditures of the board shall be al-

Appendix D—Pertinent text of Railway Labor Act, Title 45, United States Code, Sections 151, et seq.

lowed and paid on the presentation of itemized vouchers therefor approved by the chairman.

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose. May 20, 1926, c. 347, § 10, 44 Stat. 586; June 21, 1934, c. 691, § 7, 48 Stat. 1197.

APPENDIX E

Decision of the Equal Employment Opportunity Commission

JOHNNIE NICHOLS, et. al.
Charging Parties

vs.

ST. LOUIS-SAN FRANCISCO RAILWAY CO.
ST. LOUIS, MISSOURI

and

BROTHERHOOD OF RAILROAD TRAINMEN
SPRINGFIELD, MISSOURI
Respondents

Date of Filing: December 13, 1965

Date of Service of Charge: March 25 and February 17, 1966

DECISION

SUMMARY OF CHARGES

The Charging Parties, Negro, allege discrimination on the basis of race in that they are classified as Train Porters instead of Brakemen, though duties and responsibility are the same for each classification.

The Charging Parties further allege that because of job classification they have been discriminated against in terms of compensation, promotion, and conditions of employment.

In addition, the Charging Parties allege that the Respondent Union has arbitrarily and discriminatorily denied them membership in their union.

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SUMMARY OF INVESTIGATION

The Respondent Company is a freight and passenger rail carrier, operating from Florida to Texas, and principally in Southern states. It employs approximately 7,000 workers, but that employment figure has been on a constant decline.

The Respondent Union, the Brotherhood of Railroad Trainmen, has been designated under the Railway Labor Act to represent the classes and crafts of "conductors, dining car stewards, ticket collectors, baggagemen, or persons performing such duties if such service is classified under any other name, brakemen and flagmen."

The investigation record establishes that the Charging Parties, termed train porters, have been employed for a number of years primarily to perform the duties of brakemen on the Respondent Company's passenger trains. Their duties are equivalent and interchangeable with those performed by their counterpart brakemen on the rear-end of the freight trains. The only distinction is that the latter category is, with but one known exception, comprised of white men and the former category, referred to as train porters, is wholly comprised of Negro men. These Negro employees are subject to the same examinations, same qualifications, discipline and performance as their white counterparts. They operate identical equipment and are bound by the same Book of Rules in their employment. They frequently work at the rear-end station on trains in lieu of the white brakemen, as suits the economy or convenience of the management. In turn, white brakemen and conductors frequently assume the brakemen duties of the Negro train porters at the front end of passenger trains when such serves the needs or preferences of the brakemen or the management. The record shows that Negro train porters, are paid less, given less desirable assignments, and afforded less life insurance though they perform the same duties as brakemen but in addition sweep out cars, handle pillows, baggage

and assist passengers. Train porters accrue seniority only in passenger service, whereas white brakemen may acquire seniority in both freight and passenger service. Brakemen are promoted to conductor while porters are not.

The reason given by the Respondents for these differences is that the train porters comprise a separate craft and class and have traditionally been represented by a separate and less effective collective bargaining agent, the Railway Trainmen and Locomotive Firemen, International Association of Railway Employees. The investigation, on the other hand, discloses that until 1960 the Brotherhood of Railway Trainmen maintained a constitutional provision that excluded non-whites from membership. And as early as 1928 both respondents entered into a collective bargaining agreement that provided that no Negroes could be employed in capacities other than that of porter. This contract was effected pursuant to federal Railway Labor Act. The contract was abrogated in 1949.

From the late nineteenth century, Negroes were employed primarily in menial tasks, food service, handling of baggage, sweeping out trains and the like. It has been claimed that the railroads recognized Negro labor as an effective weapon against unionism and a source for cheap labor. The nature of the jobs they performed began to change and without change in title, the Negro train porters began to perform the job of brakeman, flagman and switchman on passenger trains. They were required to take the same training and examinations as white brakemen or flagmen.

Although they continued to perform the menial tasks, the operational functions soon came to be given priority.

This was demonstrated during the First World War when the federal government took over the management of the railroads and reclassified the Negro employees as firemen, trainmen and switchmen. On December 2, 1918, the United States Railroad Administration issued Supplement

Appendix E—Decision of the Equal Employment Opportunity Commission

No. 12 to General Order 27 establishing functional tests for a head end passenger brakeman. Without a change of duty, all of the Negro "train porters" satisfied the test and were carried as "passenger brakemen" and given standard brakemen's pay until the railroads were returned to private management. Throughout this period the four unions which controlled the railroad employees in operational positions explicitly excluded Negroes from membership: The Brotherhood of Railway Trainmen (BRT), the Order of Railway Conductors (ORC), the Brotherhood of Locomotive Firemen and Enginemen (BLFE), and the Brotherhood of Locomotive Engineers (BLF).

When the management of the railroads was returned to their private owners at the end of the war, a few railroads attempted to maintain the war-time status given to the porter/brakemen by consolidating the seniority lists of train porters and brakemen. The Respondent company, however, over the Negroes' protest, reduced their wages to their former level, about half the war-time rates, without change in their duties.

During this period the Railway Labor Act was passed. It provided that the then existing "craft and class" designations were to be perpetuated and legally protected by exclusive bargaining rights, subject to the will of the internal majority of a craft or class.

The question of whether "train porter" and "brakemen" constitute legitimately distinct classes and crafts was presented repeatedly to the federal courts throughout the late forties and early fifties. This occurred after the Respondent union had begun a concerted bargaining campaign to supplant the Negro work force designated "train porter" with white men classified as "brakeman." The Negro workers sued for an injunction on the grounds of racial discrimination. The District Court held that the complaint raised questions over which Congress by the Railway Labor Act had given exclusive jurisdiction to the National Railroad

Adjustment Board and the National Mediation Board, 72 F. Supp. 695. On appeal the Court of Appeals reversed this holding and found jurisdiction in the federal courts and conditioned the legality of the contract between the respondents on their recognition of the Negroes as members of the craft of "brakemen," 191 F. 2d 442. When the Supreme Court reviewed the case it also found discrimination which should be enjoined but it held the matter of craft reclassification an issue for the National Mediation Board to decide, 343 U.S. 768. Subsequent to this determination by the Supreme Court, a class effort was made on behalf of the Negro train porters to seek relief from the National Mediation Board under Section 2, Ninth of the Act and the Board advised that it was powerless to reclassify them absent a jurisdictional dispute, i.e., a situation where two unions are claiming the same class or craft of employees. Then, an action was brought under the Sixth section of the Act, which relates to applications for change of working conditions and rates of pay in an agreement, but the company refused to participate in any proceeding under this section because it contemplated a final resolution of the issues by arbitration.

Then, during the Korean War, when transport of military personnel expanded greatly, a new contract was negotiated between the respondents providing that passenger crews were to be replaced with freight crews on troop trains. As a result, the mileage and pay of the Negro trainmen was reduced.

The dilemmas of the Charging Parties are clear from the investigation; the Respondent company contends that the R.L.A. prohibits them from negotiating with the Charging Parties on matters set forth in their contract with another union, the Brotherhood of Railroad Trainmen. The Respondent Union refuses to represent the Charging Parties on the grounds that they comprise a different class or craft designated by the National Mediation Board. The National

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Mediation Board refuses to take jurisdiction over the matter because it fails to meet the standards it proposes for reexamining class and craft categories. The National Railroad Adjustment Board will not entertain the matter because it does not arise from conflicting interpretations of an existing contract.

Most recently, the class of employees from which the Charging Parties come has again sought relief from the federal court. Their case was tried before Judge Regan sitting in the Eastern District of Missouri. That court, citing the minority dissent of Justice Minton of the earlier case on the matter, found that "services" rather than "operations" were the principal functions of the train porters. This decision is now on appeal to the Eighth Circuit Court of Appeals.

DECISION

There is reasonable cause to believe that both respondents have violated Title VII of the Civil Rights Act of 1964. The Respondent company, because of race, arbitrarily and discriminatorily classified its employees and imposed conditions of employment upon the train porters less favorable than those granted brakemen.

The Respondent union has violated the Act by arbitrarily and discriminatorily refusing to admit into its membership these charging parties and the class they represent on an equal footing with its white membership.

For the Commission:
Marie D. Wilson,
MARIE D. WILSON,
Secretary.

Date: July 18, 1966.